IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1261

NORMAN A. CARLSON, Director, Federal Bureau of Prisons, *et al.*,

Petitioners,

v.

MARIE GREEN, Administratrix of the Estate of Joseph Jones, Jr.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC. AND THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK, AS AMICI CURIAE

Alvin J. Bronstein
Edward I. Koren
American Civil Liberties Union Foundation, Inc.
1346 Connecticut Ave., N.W., Suite 1031
Washington, D.C. 20036

Bruce J. Ennis
American Civil Liberties Union Foundation, Inc.
22 East 40th St.,
New York, New York, 10016

William E. Hellerstein
John Boston
Legal Aid Society of The City of New York
15 Park Row, 19th Floor
New York, New York 10038

Attorneys for Amici Curiae

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INTEREST OF AMICI

The American Civil Liberties Foundation, Inc. is the legal arm of the American Civil Liberties Union which is a nationwide non-partisan organization of over 200,000 members dedicated solely to the purpose of protecting the civil rights and liberties of Americans. Since 1920 its constant concern has been the need to provide adequate legal mechanisms to protect against, and remedy, violations of constitutionally protected rights. *Amicus* has been concerned about the importance of protecting citizens' civil rights and liberties by impos-

ing sanctions against those officials who abuse their office or are indifferent to the rights they are supposed to serve.

The Legal Aid Society of the City of New York is a private organization which serves the legal needs of the poor in many ways, including their dealings with governmental agencies and personnel. The Society is greatly concerned with maintaining and strengthening individuals' remedies against violations of their rights by governmental action.

Amici have frequently appeared before the federal courts to support their historic role in remedying and deterring violations of federal civil rights and liberties. We submit this brief *amici curiae* to urge the Court to preserve the role of the federal courts in enforcing fidelity to constitutional guarantees on the part of government officials and employees.

SUMMARY OF ARGUMENT

The existence of a tort remedy against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §2671 *et seq.*, does not confer personal immunity on federal officers against civil suit for constitutional torts, and the FTCA is not an exclusive remedy in such cases. The *Bivens* action (see *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)), like the counterpart damage action under 42 U.S.C. §1983, serves both a compensatory and a deterrent purpose. On this and other grounds, the Court in *Butz v. Economou*, 438 U.S. 478 (1978), recently refused to grant absolute immunity in constitutional cases to federal officers exercising executive discretion. The *Butz* decision—and its application in this case—is supported both by the long-standing tradition of our jurisprudence that individuals, particularly government officials, should be accountable for their misconduct, and by the specific need for deterrence of unlawful official acts. The Government's claim that exposure to

personal liability will "dampen the ardor" of officials in performing their rightful duties was fully acknowledged, and given its proper due, in the *Butz* Court's extension of a qualified immunity to federal officers, protecting them where the law is not clear and their actions are not malicious. Any possible deterrent effect of monetary sanctions against the Treasury may be nullified by the failure of highly placed officials to take strong steps to curb illegality in government, or by their own involvement in it.

This view is supported both by *Bivens* and by the language and structure of the FTCA. The Court in *Bivens* and in *Davis v. Passman*, ___ U.S. ___, 99 S.Ct. 2264 (1979), held that only an "explicit congressional declaration" that personal damage liability should not be avilable would preclude the courts from entertaining *Bivens* actions. The FTCA contains no such declaration; indeed, it strongly supports the continued availability of the *Bivens* remedy. First, Congress has specified by statute the types of cases in which the FTCA is intended to be the exclusive remedy; the present case, and constitutional torts in general, are not among them. It is generally understood that absent specific provision for exclusivity, other remedies are unaffected by the existence of the FTCA. Second, the relationship between the FTCA remedy and a suit against the individual officer is spelled out in 28 U.S.C. §2679; judgment under the FTCA is a complete bar to suit against the individual. Conversely, the absence of a judgment under the FTCA leaves open other remedies. Third, in the one instance where Congress has considered the relationship of the *Bivens* remedy and the FTCA—the 1974 amendments which extended the FTCA's coverage to certain intentional torts of federal law enforcement officials, 28 U.S.C. §2680(h)— a clear intent was expressed to permit the two remedies to coexist.

The government's claim that the FTCA constitutes a "comprehensive remedial scheme" for constitutional torts is plainly false and provides no reason for the Court to refuse to permit inference of a *Bivens* remedy in addition. The FTCA is neither "comprehensive" with re-

spect to constitutional torts, nor does it provide fully appropriate remedies for them. The FTCA is undoubtedly a comprehensive remedial scheme for common law torts of federal employees. However, its utility as a protector of constitutional rights is seriously limited, even in cases where a constitutional violation also may be pled as a common-law tort. First, there is no provision within the FTCA for deterrent sanctions; no action is prescribed against the offending individuals upon a finding of government liability, and neither punitive nor liquidated damages are permitted under the FTCA. Second, the interests protected by the common law of torts may be inconsistent or even hostile to the interests protected by constitutional provisions. Third, the relegation of FTCA claims to the law of the place where the tort occurred means that no coherent body of federal law may develop to govern federal officers. Their rights and obligations may vary from state to state—by contrast with state officers, who are governed by a body of federal law under 42 U.S.C. §1983 and the Constitution itself. Thus, federal officials in some states might be personally liable while their counterparts in other states would be personally immune for the same acts. Fourth, the FTCA's exceptions for discretionary functions and for acts performed pursuant to a statute or regulation might constitute defenses to many claims of serious constitutional violations. Fifth, there is no provision for jury trial. For all these reasons, in the absence of an explicit Congressional direction that the FTCA should be exclusive, the Court should not declare it the exclusive remedy in an area for which it was not designed and is poorly suited.

The government's position is doubly unjustifiable since Congress has explicitly rejected such a position and has demonstrated its understanding that a *Bivens* remedy exists in addition to that provided by the FTCA. In 1973, the government proposed legislation to create precisely the immunity and exclusivity it now seeks from the Court. The proposal was rejected. In 1977, new legislation was introduced to the same end. Under heavy criticism from Congress over its lack of individual accountability and other flaws, the bill was amended to

provide for an administrative disciplinary proceeding at the victim's behest and to meet other objections to the FTCA's shortcomings in constitutional cases—in short, to make the FTCA the comprehensive remedial scheme that it presently is not. This legislation has not been passed but is still pending.

Throughout the legislative debate it has been understood that the existence of the FTCA in no way precludes the availability of the *Bivens* remedy. The government's belated attempt to raise the exclusivity/immunity claim in this case and in *Loe v. Armistead*, 582 F.2d 1291 (4th Cir. 1978), *cert. pending sub nom. Moffit v. Loe*, No. 78-1260, represents not a good faith attempt to litigate a substantial issue but an attempt to bypass the serious concerns raised by Congress and to obtain from this Court the unqualified exclusivity and immunity that Congress has explicitly rejected.

ARGUMENT[1]

I

BOTH THE TRADITION OF PERSONAL ACCOUNTABILITY AND THE NEED FOR DETERRENCE AND ACCOUNTABILITY FOR OFFICIAL MISCONDUCT SUPPORT CONTINUED PERSONAL LIABILITY OF FEDERAL OFFICERS.

A. The Bivens remedy serves both compensatory and deterrent purposes when constitutional rights are violated.

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court held that an unconstitutional arrest, search and seizure by federal law enforcement agents

[1] Although this brief confines itself to the merits of the question presented in Point I of the government's brief, we note that there is substantial doubt that the Court should reach the merits of that point. As the government ad-

gave rise to a federal cause of action for damages against the agents. The broad scope of the *Bivens* remedy was recognized in *Davis v. Passman*, ___ U.S. ___, 99 S.Ct. 2264 (1979), where, in upholding a claim of sex discrimination asserted under the Fifth Amendment, the Court declared, "At least in the absence of 'a textually demonstrable constitutional commitment of [an] issue to a coordinate political department,' . . . we presume that justiciable constitutional rights are to be enforced through the courts." *Id.* at 2275.

Suits under the Constitution serve two purposes: to "provide . . . redress to the injured citizen" and to "deter federal officials from committing constitutional wrongs." *Butz v. Economou*, 438 U.S. 478, 505 (1978). The *Bivens* remedy is thus parallel in purpose to the statutory remedy under 42 U.S.C. §1983, which is widely recognized to serve deterrent as well as remedial purposes. *Robertson v. Wegmann*, 436 U.S. 584, 592 (1978) (majority opinion); *id.* at 599 (dissenting opinion); *Carey v. Piphus*, 435 U.S. 247, 257 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 442 (1976) (White, J., concurring)

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mits, Pet. Br. at 16, n. 19, the issue was not raised, briefed or passed upon by the Court of Appeals. This is hardly a case "where the proper resolution is beyond any doubt . . . or where 'injustice might otherwise result'" if the Court did not reach the merits of the newly raised argument. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (citations and footnotes omitted). Moreover, the pendency in Congress of legislation which would resolve the question presented while simultaneously making other significant changes in the Federal Tort Claims Act makes immediate decision by the Court doubly inappropriate. First, Congressional action may obviate the necessity for the Court ever to decide the question of FTCA exclusivity in constitutional cases. Second, as shown in Point II, *infra.*, it has been made clear in Congress that exclusivity will not be granted legislatively without other significant changes in the FTCA; for the Court to create that exclusivity judicially would permit the government to bypass Congress' extensive consideration and deliberation on these issues and would "judicially admit at the back door that which has been legislatively turned away at the front door." *Laird v. Nelms*, 406 U.S. 797, 802 (1972).

Amici fully endorse the contentions of the Lawyers Committee for Civil Rights Under Law in their *amicus* brief with respect to this issue.

("It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed, this was precisely the proposition upon which §1983 was enacted.")

Recognizing this parallel between the *Bivens* action and its counterpart under §1983, and the related perception that "[t]o create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head," *Butz*, 438 U.S. at 504,[2] this Court rejected the government's contention that federal officials exercising executive discretion should be afforded absolute immunity. Instead, these officials were extended only the qualified immunity enjoyed by state officials under §1983. *Id.* at 496–504.

Despite the holding in *Butz*, the government now urges upon this Court that absolute immunity—this time not limited to executive officials—be granted to federal officials in all cases where the Federal Torts Claims Act provides some remedy against the United States. The government, absent any affirmative action from Congress and in spite of clear Congressional indications to the contrary, seeks to radically restrict the scope of the *Bivens* remedy and deny citizens the opportunity to hold government officials personally responsible for violations of constitutional rights. However, examination in light of the *Bivens* holding both of the public policy issues and the relevant Congressional action and inaction mandates rejection of the government's position.

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[2]More colloquially, former Attorney General Bell, then a Judge of the Court of Appeals for the Fifth Circuit, "objected to the notion that there should be 'one law for Athens and another for Rome.'" *Butz*, 438 U.S. at 499, n. 25, quoting *Anderson v. Nosser*, 438 F.2d 183, 205 (1971) (concurring opinion).

B. Policies of accountability and deterrence support the continued availability of a damage action against federal officials who violate the Constitution.

One of the most basic premises of Anglo-American jurisprudence is that individuals are responsible and accountable for their acts of misconduct. That premise has long been recognized to underlie our concepts of tort liability.[3] Tort law recognizes both the purpose of compensation and the purpose of prophylaxis—"that injuries are to be compensated, and anti-social behavior is to be discouraged." W. Prosser, *Law of Torts* §1 at 3 (4th ed. 1971).[4]

This tradition of personal accountability has extended to governmental officers as well as private persons. As this Court recently stated:

> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law. . . .
>
> * * *

[3]Actions against officials for violation of constitutional rights have been recognized to be "a species of tort liability," *Imbler*, 424 U.S. at 417, and tort principles have informed the jurisprudence of 42 U.S.C. §1983 in several important ways. See, e.g., *Imbler* (prosecutorial immunity); *Carey v. Piphus*, 435 U.S. 247 (1978) (damages); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (qualified immunity of officials); *Monroe v. Pape*, 365 U.S. 167, 187 (1961). These principles are as applicable under *Bivens* as under §1983.

[4]The development of *respondeat superior*, although it permits a master to be held liable for the wrongful acts of a servant, is not to the contrary, since it is not intended to immunize the actual malefactor from the consequences of tortious behavior. Rather, the purpose of the doctrine has merely been to provide a "deep pocket" from which a judgment may be satisfied so that the wronged party need not go uncompensated. Generally, the victim has been permitted to assert liability against either employee or employer or both. Harper and James, 2 *The Law of Torts* §26.1, at 1363 (1956). This principle has been preserved in the Federal Tort Claims Act itself except in certain narrowly defined situations. See Point II, *infra*.

> . . . . In light of this principle, federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.
>
> —*Butz*, 438 U.S. at 506.

This view is deeply rooted in our legal tradition. Even under the English view of sovereign immunity, certain royal officials could be held liable in damages. "For, as a king cannot misuse his power, without the advice of evil counselors, and the assistance of wicked ministers, these men may be examined and punished." 1 W. Blackstone, *Commentaries*, *244; see also *id.*, Book I, ch. 9. In the United States, of course, official accountability was given added force. In cases of "positive torts," government officers

> incur the same personal responsibility, and to the same extent, as private agents. This is founded upon a very plain principle of common sense and common justice; and that is, that no person shall shelter himself from personal liability, who does a wrong, under color of, but without any authority, or by an excess of his authority, or by a negligent use or abuse of his authority. Where a person is clothed with authority, as a public agent, it cannot be presumed, that the government means to justify, or even to excuse, his violations of his own proper duty, under color of authority.
>
> —J. Story, *Commentaries on Agency* §320 (7th ed. 1869)[5]

[5]See also J. Story, *Commentaries on the Constitution* §1676 (3d ed. 1858) ("If the oppression be in the exercise of unconstitutional powers, then the functionaries who wield them are amenable for their injurious acts to the judicial tribunals of the country, at the suit of the oppressed.")

Similarly, actions to vindicate constitutional violations by state or local officials are firmly founded on principles of personal accountability. In *Monroe*, 365 U.S. at 187, the Court stated that 42 U.S.C. §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Even in those limited circumstances where a municipality or other governmental body may be held liable, *respondeat superior* does not apply; liability may not be imposed "solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 692 (1978).

The reason for maintaining this personal liability of government officers–apart from compensation of the victim and the basic moral principle that all persons should be accountable for their wrongdoing–is to deter misconduct by these officers. This consideration has been cited by Prosser in opposition to the view "[a]t the other extreme" espoused by the government, that liability for public officers' torts should rest solely with the governments that employ them.

> . . . [I]t may seriously be questioned whether the removal of the possible deterrent effect of the individual's tort liability, at least for oppressive and outrageous conduct, would be at all a desirable thing. There once was a disreputable character named John Wilkes, whose newspaper was raided and put out of business, his premises illegally searched, and his property seized and confiscated, all for the worst kind of political motives. The tort actions which arose out of this high-handed piece of oppression were long regarded as a major blow struck for the freedom of the individual against the abuse of governmental power; and so long as cheap and conniving politicians continue to abuse that power, they should not be forgotten.
>
> –Prosser, *supra*, §132 at 992 (footnote omitted)

See also Berman, *The Need for an Integrated System of Governmental Tort Liability*, 77 Col.L.Rev. 1175, 1198-99 (1977).

The government's position on the policy issues of personal liability versus governmental liability and personal immunity rests on several questionable propositions. First, the government invokes the weary specter of the fear of judgments and the burden of litigation "dampen[ing] the ardor" of officials in the "unflinching discharge of their duties." Pet. Br. at 39, quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949). Second, it assumes that the deterrent value of personal liability on improper conduct is outweighed by the supposed inhibition of officers in the proper performance of their jobs, and that the conflict must be resolved by choosing one or the other. Pet. Br. at 39–40.[6] Third, it claims that governmental liability as provided by the FTCA is at least as satisfactory a deterrent as is personal liability.

None of these arguments withstands scrutiny. The "dampened ardor" argument has been termed a "gossamer web self-spun without a scintilla of support to which one can point." *Barr v. Matteo*, 360 U.S. 564, 590 (1959) (Brennan, J. dissenting).[7] Questioned in Congress as to the existence of any "hard evidence that Federal employees have been inhibited in their proper activities by suits," then Attorney General Bell could offer only a "hard feeling that the FBI

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[6] Another argument, directed at the facts of this case, is that "lack of proper medical care for prisoners involves a systematic breakdown rendering individual liability less appropriate." Pet. Br. at 34. The government apparently believes that systems break down by magic or natural law rather than by the malfeasance or neglect of individuals. Suffice it to say that if the respondent proves "deliberate indifference to serious medical needs" on the part of any defendant, see *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976), individual liability will be highly appropriate.

[7] See also criticism of *Gregoire* in Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Officials*, 74 Harv. L.Rev. 44, 50, n. 24 (1960) and Becht, *The Absolute Privilege of the Executive in Defamation*, 15 Vand. L.Rev. 1127, 1166 n. 199 (1962).

agents were very worried about civil suits," coupled with an anecdote about two federal building inspectors sued for common law negligence–a risk no different from the risk of suit in private business. *Amendments to the Federal Torts Claims Act: S. 2117, S. 2868, S. 3314. Joint Hearings Before the Subcommittee on Citizens and Shareholders Rights and Remedies and the Subcommittee on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 23 (1978) (Statement of Griffin Bell) [Hereinafter *1978 Joint Senate Hearings*]. While this lack of empirical proof of what may be an ultimately untestable proposition does not prove that "dampened ardor" is nonexistent, the Court should not take on faith self-serving claims of its magnitude and seriousness by those who would like to be immunized.

The Government proceeds from this dubious premise to an altogether illogical conclusion when it assumes that the only acceptable response to "dampened ardor" is simply to grant absolute immunity to constitutional tortfeasors in its employ. In fact, there is a middle ground, which the Court found quite firm in *Butz*: extend to federal officials the qualified immunity enjoyed by state officials under 42 U.S.C. §1983. This doctrine preserves liability where official conduct is clearly unconstitutional or done with malice; however, it excuses acts done with innocent motive where the constitutional prohibition was not settled. This doctrine frees the officer from the necessity of predicting the course of future constitutional decision while preserving the obligation to be aware of settled law and to avoid malicious abuse of official power. Moreover, qualified immunity encourages the most satisfactory balance between the hypothetical "dampened ardor" and a lack of personal deterrence:

> . . . [T]he prospect of such suits has led Federal employees to seek guidance on their authority to engage in activities the constitutionality of which may be challenged. This pressure has given impetus to the

> legislative efforts to enact a charter for the FBI and CIA to define the limits of lawful activity.
>
> –124 Cong. Rec. S19484 (daily ed. Oct. 14, 1978) (remarks of Sen. Abourezk)

This protection from unjust liability does not, of course, eliminate the burden admittedly inherent in any litigation, regardless of the outcome. However, the fact that the United States provides counsel to defend these lawsuits removes the most serious burden of litigation; the courts have ways of screening out frivolous lawsuits, *see Bivens*, 403 U.S. at 410 (Harlan, J., concurring); *Butz*, 438 U.S. at 507; and even if the entire body of *Bivens* litigation were transformed into FTCA suits, the officials whose conduct was challenged would still be required to participate in discovery, serve as witnesses, and otherwise assist in the defense of the cases.

The government attempts to bolster its unconvincing argument by claiming that governmental liability constitutes an adequate deterrent for constitutional violations.[8] This too is unpersuasive. First, it is not at all clear how immunizing individuals while placing liability on the government would cause greater deterrence of improper conduct but less "dampened ardor." If executive officials are expected to fear for their careers if FTCA judgments are won, or to lose sleep over payments from the Treasury, or to be embarrassed by judgments under the FTCA or annoyed by participation in FTCA litigation, it

[8] Initially one must question the assignment of great deterrent value to a statutory scheme which explicitly forbids the award of punitive damages. 28 U.S.C. §2674. This statutory provision is especially problematical given the number of serious constitutional violations for which an award of compensatory damages could not be made or would not be large, see *Carey v. Piphus*, 435 U.S. at 266-67. Punitive damages have generally been held available under both §1983 and *Bivens*. Under §1983 see cases cited in *Carey v. Piphus*, 435 U.S. at 257, n. 11; see also *O'Connor v. Donaldson*, 422 U.S. 563, 572 (1975). Under *Bivens*, see *Paton v. La Prade*, 524 F.2d 862, 871-72 (3d Cir. 1975); *Hanna v. Drobnick*, 514 F.2d 393, 398 (6th Cir. 1975); *Alvarez v. Wilson*, 431 F.Supp. 136, 144 (N.D.Ill. 1977).

is difficult to see, under the government's theory, why they should not suffer "dampened ardor" in the form of overly cautious policy-making or overly restrictive supervision. Conversely, if they are not greatly affected by these events, it is difficult to see how they would be motivated to take "unflinching" action to curb illegality on the part of their subordinates.[9]

Moreover, common sense and recent experience raise grave doubts as to the efficacy of a deterrent directed only at the public fisc. The effectiveness of such a deterrent assumes first, that all officials in responsible positions are concerned about the disposition of public funds, and second, that all officials are both willing and able to take effective action to control illegal behavior in their agencies. One hopes, of course, that both of those premises are true; but realistically, they cannot be relied upon in every case.[10] Officials may see writing checks against the Treasury as a relatively painless way of buying off

[9]The claim that "there is substantial indication that imposing liability on the government alone . . . actually leads to greater deterrence of constitutional violations by forcing the promulgation of corrective policies," Pet. Br. at 40, falls when sources are examined. The actual language of the cited case is: "Moreover, a municipality is *arguably* in the best position to reduce the incidence of such behavior by promulgating corrective policies." *Turpin v. Mailet*, 579 F.2d 152, 165 (2d Cir. *en banc* 1978), *vacated and remanded*, 439 U.S. 974 (1978), *reinstated in part and remanded*, 591 F.2d 426 (2d Cir. 1979) (emphasis supplied). The cited law review article states, "The threat of monetary judgments against government units *may*, however, spur higher officials to design their hiring and training programs, disciplinary procedures, and internal rules so as to curb misconduct." Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 Harv. L. Rev. 922, 927 (1976) (footnote omitted) (emphasis supplied). Examination of the sources of these sources provides no greater certainty. To abolish the time-honored remedy of individual liability on this speculative basis would be unwise and unsound.

[10]For example, a rather different attitude both toward the unlawful acts of subordinates and toward the stewardship of other people's money is suggested by transcripts of a conversation on March 21, 1973 among then President Nixon and his counsel John Dean (later joined by aide H.R. Haldeman), in which they discussed unlawful surveillance and other improper activities which might be traced to the President's subordinates and the danger that certain individuals then in jail might reveal this damaging information unless large sums of money were made available to them.

> P–How much money do you need?
>
> D–I would say these people are going to cost a million dollars over the next two years.
>
> P–We could get that. On the money; if you need the money you could get that. You could get a million dollars. You could get it in cash. I know where it could be gotten.
>
> –*The White House Transcripts: Submission of Recorded Presidential Conversations to the Committee on the Judiciary of the House of Representatives by President Richard Nixon* (G. Gold ed. 1974) at 146–47.

Later, discussing the specific demand of E. Howard Hunt for $120,000, the President observed, ". . . [F]or your immediate things you have no choice but to come up with the 120,000, whatever it is. Right?" *Id.* at 172.

those who press complaints of illegality, while giving their attention and energies to other matters that they assign higher priorities, such as maintaining the "morale" of their subordinates. See, Bell, *Proposed Amendments to the Federal Torts Claim Act*, 16 Harv. J. of Leg. 1, 6 (1979). They may encourage or permit unconstitutional policies for ends they believe correct and accept judgments against the fisc as a cost of doing business. For that matter, they may themselves be involved in the unconstitutional behavior. Finally, they may be well-intentioned but unable, because of personal inadequacy, lack of information, or other reasons, to impose standards of lawful behavior upon their subordinates.

In any of these situations, recovery against the United States, while it would compensate the complaining party for any traditionally measurable damages suffered, see *Carey v. Piphus*, would not adequately

serve the interest of society in assuring that constitutional rights are "scrupulously observed," *Id.*, 435 U.S. at 266.[11]

II

NEITHER THE COURT'S HOLDING IN *BIVENS* NOR THE LANGUAGE AND STRUCTURE OF THE FEDERAL TORT CLAIMS ACT (FTCA) SUPPORTS THE VIEW THAT THE FTCA IS AN EXCLUSIVE REMEDY FOR CONSTITUTIONAL VIOLATIONS BY FEDERAL OFFICERS OR THAT THE *BIVENS* REMEDY SHOULD BE WITHHELD WHERE A SUIT LIES UNDER THE FTCA.

A. Because there is no explicit Congressional direction that the FTCA be an exclusive remedy in constitutional cases, the existence of the FTCA has no bearing on the availability of the Bivens remedy.

In *Bivens* the Court explicitly addressed the way in which Congressional action or inaction should be weighed:

> . . . the present case involves no special factors counseling hesitation in the absence of affirmative action by Congress. . . . [W]e cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit

[11] Indeed, then Attorney General Bell conceded as much in explaining the absence of punitive damages under S.2117: "Since the victim's remedy will no longer be against the individual who wronged him, but rather against the government, the imposition of punitive damages would penalize only the taxpayer without serving any meaningful deterrent purpose." *1978 Joint Senate Hearings, supra*, 29 (Letter from Attorney General Bell to Vice President Mondale Sept. 19, 1977). Similarly, no "meaningful deterrent purpose" would be served by relegating the victim to a remedy that permits only compensatory damages.

> Congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.
>
> —*Bivens*, 403 U.S. at 396–97

This standard was reiterated in *Davis v. Passman.* There, the Court of Appeals had construed the failure of Congress to provide anti-discrimination remedies for Congressional employees as intended to bar such remedies. This Court held that this fact did not constitute the "'*explicit* Congressional declaration'" referred to in *Bivens* and that the Congressional inaction did not foreclose the judicially created remedy. ___ U.S. at ___, 99 SCt. at 2277, quoting *Bivens*, 403 U.S. at 397 (emphasis supplied by Court).[12] By the same token, where (as here) there is no explicit Congressional declaration that the victims of a constitutional violation may not recover from the responsible federal employee but must be remitted to the statutory cause of action against the government, there is no reason to restrict the presumptive availability of the *Bivens* remedy declared by the Court in *Davis v. Passman*, ___ U.S. at ___, 99 S.Ct. at 2277–78.

B. Congress did not intend to make the FTCA an exclusive remedy, or to immunize federal officers from personal liability, except in certain narrow circumstances not applicable here.

Under the *Bivens* standard, extensive canvassing of legislative intent with regard to the FTCA is not necessary absent an explicit declara-

[12] The *Davis* Court also held explicitly that the criteria of *Cort v. Ash*, 422 U.S. 66 (1975), for the inference of private causes of action from statutory rights, have no application to the *Bivens* remedy for constitutional infringements. ___ U.S. at ___, 99 S.Ct. at 2274-75.

tion that it is an exclusive remedy. However, the clear import of the structure and history of the FTCA is that remedies against individual officers were not intended to be ousted except under certain carefully delimited circumstances.

First, Congress *has* explicitly declared, in other types of cases, that the victims of federal employees' wrongful acts must be remitted to the FTCA. Thus, exclusivity has been extended to cases arising, *inter alia*, from the operation of motor vehicles by federal employees, 28 U.S.C. §2679; those involving the malpractice of certain government physicians, 38 U.S.C. §4116; 42 U.S.C. §§233, 2458(a); 22 U.S.C. §817; 10 U.S.C. §1089; and those against the manufacturers of swine flu vaccine, 42 U.S.C. §247(b). Given these explicit and limited declarations of exclusivity, common sense—and the commonplace maxim, *expressio unius est exclusio alterius*—suggest that Congress did not intend the FTCA to pre-empt other remedies in other types of cases.[13] Indeed, this has been the consistent holding of the lower courts. *Henderson v. Bluemink*, 511 F.2d 399, 403–04 (D.C. Cir. 1974); *Government Employees Insurance Co. v. Ziarno*, 273 F.2d 645 (2d Cir. 1960); *Fayerweather v. Bell*, 447 F.Supp. 913 (M.D. Pa. 1978); *Turner v. Ralston*, 409 F.Supp. 1260 (W.D. Wis. 1976). It is also the settled understanding among leading commentators on the FTCA. L. Jayson, *Handling Federal Tort Claims: Administrative and Judicial Remedies* §§178.01–178.03 (1964); W. Wright, *The Federal Tort Claims Act: Analyzed and Annotated* 77, 78, 79 (1957). The same view is supported by 28 U.S.C. §2676, which provides that judgment under the FTCA is a complete bar to suit against the individual employee involved—suggesting, conversely, that absent such a judgment, the individual may be sued.

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[13] Petitioner's claim that these narrow exclusivity positions somehow "reflect a *general* congressional intent to limit the personal liability of government employees action in the scope of their duties" (Pet. Br. at 35; emphasis supplied) is simply incomprehensible.

Moreover, in the single instance where Congress has directly considered the relationship of the FTCA to the *Bivens* remedy, Congress not only refrained from declaring the FTCA an exclusive remedy but indicated that it was quite comfortable with the coexistence of the *Bivens* remedy and the FTCA. In 1974, when Congress amended the FTCA to extend its coverage to include certain intentional torts committed by federal investigative or law enforcement officers,[14] it clearly acknowledged the viability of the *Bivens* remedy as an alternative to the FTCA.

> . . . [A]fter the date of enactment of this measure, innocent individuals who are subjected to raids of the type conducted in Collinsville, Illinois, will have a cause of action *against the individual Federal agents and* the Federal Government. Furthermore, *this provision should be viewed as a counterpart to the Bivens case* and its progenty [sic], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved).
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> S. Rep. No. 588, 93d Cong., 2d Sess., 1974 U.S. Code Cong. & Adm. News 2789, 2791 (emphasis supplied).

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[14] 28 U.S.C. §2680(h) provides a remedy against the United States for claims "arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" committed by those officers.

While the present case does not arise under the 1974 amendments,[15] this legislative history[16] definitively refutes the notion that Congress regards the FTCA and the *Bivens* remedy as incompatible or redundant. Moreover, Congress' tolerance of the parallel *Bivens* remedy under the 1974 amendments, and of parallel state remedies in those areas of tort law not covered by one of the above-cited exclusivity provisions, undermines any argument that litigants must not be allowed to "avoid the statute of limitations, the administrative procedures, and other provisions carefully imposed by Congress in this area." Pet. Br. at 30-31 (footnotes and citations omitted). It is obvious from the statutory scheme and its tolerance of parallel remedies that these provisions are of concern to Congress only when recovery is to be had against the United States.

These indications of legislative intent are not, of course, binding on the Court's ultimate decision to recognize or deny the *Bivens* remedy. *Davis v. Passman*, ___ U.S. at ___, 99 S.Ct. at 2275. However, in view of the clear legislative intent *not* to make the FTCA an exclusive remedy in most cases, it is absurd to argue that deference to the legislative scheme of the FTCA is sufficient reason—or any reason—for restricting the *Bivens* remedy.

C. The FTCA is not a comprehensive remedial scheme for violations of constitutional rights.

In view of the *Bivens* standard and the clear intent of the FTCA to leave other remedies undistrubed, the Court need not reach the

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[15] Allegations of defective prison medical care were recognized as actionable under the FTCA long before 1974. *United States v. Muniz*, 374 U.S. 150 (1963).

[16] The quoted Senate report has been treated as the authoritative source for the legislative intent behind the 1974 amendments. *Norton v. United States*, 581 F.2d 390, 396 (4th Cir. 1978), *cert. denied* ___ U.S. ___, 99 S.Ct. 613 (1978).

Government's claim that the FTCA is a "comprehensive remedial scheme for the kind of claim raised here," Pet. Br. at 27, and that therefore the Court should restrict the availability of the *Bivens* remedy. However, the argument not only is irrelevant but proceeds from a false premise; the FTCA is not such a scheme. See Statement of Assistant Attorney General Babcock, *1978 Joint Senate Hearing, supra* at 370 (FTCA as applied to constitutional claims a "much troubled area of our legal system.")

The FTCA is by its terms designed to compensate the victims of most common law torts by government officers. The fact that some constitutional violations also give rise to common law tort claims hardly transforms the FTCA into a "comprehensive remedial scheme" for the vindication of constitutional rights. In fact, the FTCA displays significant shortcomings when drafted into the role of constitutional protector.

First, as discussed above, the FTCA lacks any provisions for individual accountability of any sort. Not only can individuals not only be sued under the FTCA; there is no provision for administrative sanction against the offending officer if the United States is found liable. Second, even if one makes the questionable assumption that a money judgment against the United States can effectively deter misconduct by its agents, the provisions of the FTCA are clearly inadequate for that purpose. The statute expressly bars punitive damages. 28 U.S.C. §2674. Moreover, many serious violations of the Constitution may be no more than nominally compensable under ordinary tort principles or under state law. *Carey v. Piphus*, 435 U.S. at 266. Third, the FTCA expressly forbids trial by jury, 28 U.S.C. §2402—a significant shortcoming where the claim is one of governmental abuse of citizens' constitutional rights.[17] Fourth, the

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[17] The Government may well be correct that frequently the absence of jury trial will be advantageous to the plaintiff, Pet. Br. at 38. However, it is hardly the Government's role to make that judgment; absent a clear Congressional direction to the contrary, the present option to choose between jury and nonjury procedures should be maintained.

FTCA, by its provision that the United States "shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. §2674, permits the government to take advantage of an individual tortfeasor's defense of "good faith" or qualified immunity. *Norton v. United States*, 581 F.2d 390. Thus, the FTCA's compensatory design is compromised in constitutional cases by a defense designed for the protection of individual officers in the good faith execution of their tasks. See *Butz v. Economou*, 438 U.S. at 506–07. Fifth, the FTCA contains an exception for acts performed by federal employees "exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid," 28 U.S.C. §2680(a)—a provision that would leave the claimant without any remedy where the act, however blatantly unconstitutional, was "protected" by statute or regulation. Sixth, the FTCA, in the same section, provides immunity for the United States in cases "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion be abused." This section has been interpreted as exempting from liability all decisions made "at a planning rather than an operational level." *Dalehite v. United States*, 346 U.S. 15, 42 (1953). In constitutional cases, this immunity has already been rejected as to individuals by the court in *Butz*. Obviously, many serious constitutional violations can result from the abuse of official discretion. It hardly makes sense to relegate the constitutional claimant to a remedy that is more limited than the *Bivens* action under the guise of serving a "comprehensive remedial scheme."[18] Seventh, the FTCA, in relegating the plaintiff

[18] Although the government does not make its position clear on this point, a litigant whose complaint revealed a claim actionable under state tort law would presumably be forced to seek relief through the FTCA, and if the claim was ultimately determined to be barred by one of the FTCA's exceptions, the plaintiff would have no remedy. The alternative position—that if subsequent proceedings resulted in dismissal not on the merits, the claimant would then be permitted to bring a *Bivens* action—would be no more satisfactory. If the statute of limitations had run on the *Bivens* claim by the time

to "the law of the place where the act or omission occurred," 28 U.S.C. §1346(b), precludes the development of a coherent body of federal law to guide the actions of federal officials and to govern actions to enforce federal rights against the federal government.

The importance of this last point cannot be overemphasized. ". . . [L]eav[ing] the problem of federal official liability to the vagaries of common-law actions," *Bivens*, 403 U.S. at 409 (Harlan, J., concurring), is not merely inconvenient. As *Bivens* itself noted, the interests protected by state tort law and by constitutional provisions "may be inconsistent or even hostile." *Id.* at 394 (majority opinion), 409 (Harlan, J., concurring). Certainly, as Justice Harlan warned, "there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers depending on the State where the injury occurs." *Id.* at 409. Such a result, especially where *state* official liability is governed by a uniform body of federal law developed under §1983 from general tort principles, would surely "stand the constitutional design on its head." *Butz*, 438 U.S. at 504.[19]

The anomalies that would result from adoption of the government's position are, indeed, illustrated in *Bivens* itself. The 1974 amendments to the FTCA, 28 U.S.C. §2680(h), would now permit someone

of the FTCA dismissal, the *Bivens* claim would also be lost. This uncertainty at the outset of litigation would create a strong incentive to bring both a *Bivens* and an FTCA suit in every case, so that a mistake of fact or law would not leave the victim without a remedy. The same result would obtain in a case where the law was unclear as to the existence of a state tort remedy or where factual development of the case showed that it did not meet the precise requirements of the state tort cause of action. Thus, the government's position would, on this alternative construction, create serious problems of manageability not even alluded to in its brief.

[19] Civil rights actions under §1983 are governed by state law only "so far as such laws are suitable to carry the same [the vindication of civil rights] into effect." 42 U.S.C. §1988.

in Webster Bivens' situation to sue the United States under local law. However, as Justice Brennan pointed out, 403 U.S. at 625, state tort law may excuse liability where government agents obtain entry by consent—a consent that is likely to be forthcoming simply because the agents invoke their governmental status. Application of state law under the FTCA would thus lead to the very result that the *Bivens* holding was designed in part to avoid. Moreover, federal officers' liability would depend on the availability of the consent defense from state to state. Similar anomalies are illustrated by *Birnbaum v. United States*, 588 F.2d 319 (2d Cir. 1978), in which FTCA liability was found for the opening of international mail by the Central Intelligence Agency. This determination of liability for a national agency's misconduct on a matter involving international relations was reached by an extensive—and sometimes speculative—canvass of the New York state law of privacy. (The law of common law copyright was also examined, but no liability was found on this basis.) Such a result is, of course, wholly incongruous and inappropriate. Moreover, had the case arisen in Wisconsin instead of in New York, the same acts could not have formed any basis for FTCA liability, since Wisconsin does not recognize a tort cause of action based on the right of privacy. *Hirsch v. S.C.Johnson & Sons*, ___ Wis. ___, 289 N.W.2d 129 (Wis.Sup.Ct. 1979). Thus, under the government's position, federal officials in some states would be personally liable for compensatory and punitive damages. In other states the purported exclusivity of the FTCA remedy would render federal officials personally immune.

In short, the government's characterization of the *Bivens* action as a "redundant remedy," Pet. Br. at 35, ignores substantial differences between *Bivens* and the FTCA and the significant inadequacies of the FTCA as applied to constitutional violations.

D. Congress has rejected executive proposals to grant personal immunity to federal officers in constitutional cases without significant changes in the FTCA. The Court should not permit the government to obtain from it what Congress has been unwilling to grant.

In applying the FTCA this Court has warned against "judicially admit[ting] at the back door that which has been legislatively turned away at the front door." *Laird v. Nelms*, 406 U.S. 797, 802 (1972). This is precisely the end sought by the government in this case. The executive branch has been seeking for six years to persuade Congress to grant federal employees immunity for constitutional torts;[20] its lack of success has been caused in large measure by Congress' concern over the policy questions cited in this brief. Indeed, these precise questions, as articulated in Congress, have compelled the Justice Department to revise its legislative proposals significantly, so that legislation now pending reflects a careful balancing of deterrence and other policies, a balancing completely absent from the government's position in this case. For the Court to adopt the government's position would be to pre-empt and bypass the concern of Congress with issues of deterrence and uniformity in the enforcement of constitutional rights.

In 1973, the Justice Department supported legislation that would have made the FTCA the exclusive remedy in all cases of federal constitutional violation. The Senate, however, rejected the government's bill, S.2558, 93d Cong., 1st Sess. (1973), and substituted for

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[20] In the legislative proceedings it has been assumed by the legislators and conceded by the Justice Department—directly contrary to the government's position in this Court—that the FTCA in its present form provides no basis for restriction of the *Bivens* remedy or immunization of federal officers. See, e.g., comments of Sen. Hruska, 119 Cong. Rec. 33495-97 (1973); comments of Sen. Metzenbaum, *1978 Joint Senate Hearings, supra* at 2; testimony of Attorney General Bell, *id.* at 5-6; Justice Department Responses to 12/14/77 Questions on S.2117, *id.* at 94-95.

it S.588, 93d Cong., 1st Sess. (1973), ultimately passed as 28 U.S.C. §2680(h). This amendment to the FTCA extended its coverage to include certain intentional torts, see 28 U.S.C. §2680(h), but was explicitly intended not to pre-empt or displace the *Bivens* remedy. Its legislative history clearly indicates that aggrieved individuals were to have a remedy "against the individual federal agents and the Federal Government. . . . [T]his provision should be viewed as a counterpart to the *Bivens* case and its progenty [sic]. . . ." S.Rep. No. 588, 93d Cong., 2d Sess., 1974 U.S. Code Cong. & Adm. News 2789, 2791.[21]

In the House of Representatives, H.R. 10439, 93d Cong., 2d Sess. (1974), (counterpart to S.2558) died in committee. While it is impossible conclusively to state the reason for Congress' failure to pass legislation, it is clear that there was substantial concern for the lack of individual accountability that would result from abolishing the *Bivens* action and making the FTCA an exclusive remedy.

> Mr. MOORHEAD. You know, in these times when the public is so cognizant of the extreme acts of gross negligence where persons are shot where no weapons should be used at all, I think this could cut down on the care and diligence given by the police officers.
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[21] Senator Percy, one of the sponsors of the legislation, had previously expressed his view that the government should be required to compensate the victims of constitutional violations but that nevertheless "we must not lose sight of the important deterrent value served by the threat of civil suits being brought against offending agents. Federal narcotics officers must realize that they will be held responsible for their intentional violations of constitutional rights. . . ." S.Rep. No. 469, 93d Cong., 1st Sess. 36 (1973) (additional views of Senator Percy).

> . . . I really hate to see a situation where there is no possible action financially that can be taken against willful or gross negligence in situations like this without resort to a criminal trial.
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> *Federal Torts Claim Amendments: Hearings on H.R. 10439 Before Subcommittee on Claims and the Governmental Relations of the House Committee on the Judiciary*, 93d Cong., 2d Sess., 16, 17 (1974).

See also testimony by J. Clay Smith, Chairman of the Tort Law Association. *Id.* at 34 (opposition expressed by some members to elimination of individual responsibility of federal employees).

On September 21, 1977, Senator Eastland introduced S.2117, 95th Cong., 1st Sess. (1977) drafted in the Justice Department and substantially similar to the 1973 proposal. Subsequently, a series of amendments was proposed by the Justice Department in response to committee criticism and debate. Ultimately these amendments were incorporated into a new bill, S. 3314/H.R. 9219, 95th Cong., 2d Sess. (1978), reintroduced in 1979 and still pending as H.R. 2659, 96th Cong., 1st Sess. (1979).

Criticism of the original bill and its amendments in both the House and the Senate centered around the proposal to immunize federal officers from personal liability. Rep. Jordan stated, "My first reservation about it is whether if, upon enactment of such legislation, the Federal employee somehow begins to feel cavalier about the conduct of his duties and the management of this own personal conduct, if you say the United States is exclusively liable. . . ." *Federal Tort Claims Act: Hearings on H.R. 9219 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary.* 95th Cong. 2d Sess. 10 (1978). Similarly, Rep. Mazzoli stated, "I think a

problem all of us have, is what has been earlier said as to what extent would the adoption of this kind of piece of legislation encourage people to be something less than prudent or circumspect or careful in their behavior. . . ." *Id.* at 18. Rep. Harris stated: "We have a basic problem that we have to work with and that is: Does this fact take off some of the disciplinary, some of the motivation of a police officer not to commit acts contrary to an individual's constitutional rights?" *Id.* at 28. Skepticism was expressed with regard to the efficacy as a deterrent of existing internal disciplinary procedures. See comments of Rep. Danielson, *id.* at 150–51; comments of Rep. Harris, *id.* at 140.

Similarly, in the Senate there was serious concern about the lack of accountability in a scheme for exclusive government liability for constitutional torts. As Senator Abourezk stated, S.2117 in its original form "[could] fairly be characterized as a private relief bill for every Federal official who violates the constitutional rights of American citizens . . . . [I]t is not hard to see that granting such broad and unequivocal immunity could encourage further lawlessness by federal officials." 124 Cong. Rec. S19483 (daily ed. Oct. 14, 1978); see also Prepared Statement of Assistant Attorney General Babcock, *1978 Joint Senate Hearing, supra,* at 370; Statement of Sen. Abourezk, *id.* at 3–4. Even after the bill was amended–absent which the bill clearly would not have passed, Abourezk, *id.* at 858–substantial concern remained about deterrence and accountability. See comments of Sen. Abourezk, *id.* at 860, 876; comments of Sen. Metzenbaum, *id.* at 375; comments of Sen. Percy, *id.* at 357-58; comments of Sen. DeConcini, *id.* at 355 (flaw in bill is that "it substitutes a strong remedial measure–the deep pocket of the United States–for a strong prophylactic measure–personal liability of the official").

These criticisms resulted in the submission of an amendment to permit the victim of unconstitutional conduct to initiate disciplinary proceedings against the offending federal employee. Letter from

Justice Dept. to Sen. Metzenbaum, April 10, 1978, *1978 Joint Senate Hearing, supra* at 52; see also exchange among Sen. Metzenbaum, Attorney General Bell, and Deputy Assistant Attorney General Jaffe, *id.* at 11–18. Attorney General Bell conceded that the prior absence of such a provision was "an obvious defect," *id.* at 15, and that the subcommittee would not report the bill out without it, *id.* at 17.

Other Congressional concerns about the defects of the FTCA as a constitutional remedy were also responded to by amendment.[22] For example, the Justice Department "decided to yield" and agreed to delete language permitting the government to assert the defense of "good faith" or qualified immunity. *Id.* at 93 (responses to questions), 48 (amendment). An amendment was submitted excepting constitutional torts from the "discretionary" and "statute or regulation" exceptions of 28 U.S.C. §2680(a). *Id.* at 48-49. Class actions would be permitted under the amended bill. *Id.*

Thus, the executive branch has made substantial concessions in recognition of concerns about personal accountability and other defects in its original proposal to make the FTCA an exclusive remedy in constitutional cases. The result is a pending proposal that, in former Attorney General Bell's words, "attempts to strike a difficult and careful balance between redressing Government wrongs suffered on occasion by individual Americans and the undisputed need to permit our Federal employees to conduct the affairs of Government in an uncowardly manner." *Id.* at 8.

For the government to seek, at this point, judicial endorsement of its original, rejected position, which would disregard and bypass all the Congressional objections to that position and discard the

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[22]Even in its original form, S.2117 provided for liquidated damages of $1000 where greater compensatory damages could not be proved. *Id.* at 33. The problem of incorporation of the "law of the place" would also be solved by S.2117 as introduced. *Id.* at 32.

"difficult and careful balance" in favor of a radical and one-sided limitation on individual remedies against governmental abuse of power, is simply disingenuous and should not be permitted.

CONCLUSION

For the reasons stated above, the judgment of the Seventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

Alvin J. Bronstein
Edward I. Koren
American Civil Liberties Union
Foundation, Inc.
1346 Connecticut Ave. N.W.,
Suite 1031
Washington, D.C. 20036

Bruce J. Ennis
American Civil Liberties Union
Foundation, Inc.
22 East 40th St.
New York, New York 10016

William E. Hellerstein
John Boston
Legal Aid Society of the City of
New York
15 Park Row, 19th Floor
New York, New York 10038

*Attorneys for Amici Curiae.**

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